IN THE

Supreme Court of the United States

October Term, 1907.

Abram J. Hemmens, Collector of Internal Revenue, Petitioner,
vs.
Manufacturers Packing Company, Respondent.
No. 897.

MOTION FOR LEAVE TO FILE BRIEF

AND

BRIEF OF FRIENDS OF THE COURT.

Kenneth Brewster,
James A. T. Lyons,

January 17, 1907.

INDEX.

	PAGE.
Motion	1
Brief	2
Statement	2
The Facts	4
The Statutes	4
Summary of Points	6
Argument	7
Point I: Article 9 of Regulations 57 is an improper construction of the statutes and is invalid	7
Point II: The statutes impose no tax on telegrams sent under a contract for exchange of services	12
Point III: The calculation under the contract of the number of messages to be carried free by reference to established schedules of rates does not render such messages paid messages nor render them taxable	19
Conclusion	25

TABLE OF AUTHORITIES.

Cases:

Delaware, Lackawanna & Western R. R. v. *Bowers*, Printed in appendix to Government's brief	14
Duffy v. *Putney*, 2 Fed. (2d) 230	16
Eisner v. *Macomber*, 252 U. S. 189	18
N. Y., O. & W. Ry. Co., Appeal of, 1 B. T. A. 1172	16
Postal Telegraph-Cable Co. v. *Tonopah & Tide Water R. R. Co.*, 248 U. S. 471	21, 23
Western Union Tel. Co. v. *D. L. & W. R. R. Co.*, 282 Fed. 925	14

Statutes:

Interstate Commerce Act, Section 1, ** 5, 7 9

Revenue Act of 1918:

Section 201 (a) 9
Section 202 (b) 9
Section 213 (a) 9
Section 500 (f) 4, 12, 13, 14, 17, 22
Section 500 (g) 4, 10, 17, 24
Section 501 5, 13
Section 502 6, 13, 14, 15
Section 800 (a) 2, 5 9
Section 801 10
Section 900 10, 21
Section 901 10, 21
Art. IX, Sch. A, 3, 4 10

Revenue Act of 1921:

Section 500 (a) 6, 12, 22
Section 500 (b) 6, 24
Section 501 6
Section 502 6

Regulations:

Regulations 57, Article 9 7

IN THE

Supreme Court of the United States

October term, 1926.

ARNOLD J. HELLMICH, Collector of Internal Revenue, *Petitioner*,
vs.
MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*.
No. 307.

MOTION FOR LEAVE TO FILE BRIEF.

To the Supreme Court of the United States:

The undersigned respectfully move that they be given leave to file the annexed brief, as friends of the Court, for the following reasons:

This cause involves the question of the taxability, under Section 500 of the Revenue Acts of 1918 and 1921, of certain telegraph messages transmitted by the Western Union Telegraph Company under a contract with the Missouri Pacific Telegraph Company for mutual interchange of services. A similar question is involved in a suit now pending in the Court of Claims between the Boston and Maine Railroad, for which the undersigned are of counsel, and the United States, proceedings in which have been suspended pending the decision of this Court in this cause, for the reason that the decision here may be controlling in said suit. The Boston and Maine Railroad will therefore be materially affected by the decision in this cause, and has requested the undersigned to file a brief herein showing the reasons why we believe that the judgment below should be affirmed.

KINGMAN BREWSTER,
JAMES S. Y. IVINS.

January 17, 1927.

the United States, and proceedings therein are suspended pending the decision of this Court in the *Missouri Pacific* case, in which this brief is filed by counsel for the Boston and Maine Railroad, as friends of the Court.

The Facts.

The facts in the case at bar seem to be correctly stated in the Government's brief, pages 2-8, and will not be repeated here.

The Statutes.

The Revenue Act of 1918 provides:

> "Sec. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by Section 500 of the Revenue Act of 1917
>
> * * * * * * * *
>
> "(f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents. *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and
>
> "(g) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a com-

mon carrier or telegraph or telephone company, of its business as such;

* * * * * * *

"SEC. 501. (a) That the taxes imposed by Section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * * * *

"(c) The taxes imposed by Section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. In case a carrier (other than a pipe line) principally engaged in rendering transportation services or facilities for hire does not, because of its ownership of the goods transported, or for any other reason, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such goods if the carrier received payment for such transportation, such tax, if it can not be computed from actual rates or tariffs of the carrier, to be computed on the basis of the rates or tariffs of other carriers for like services as determined by the Commissioner. In the case of any carrier (other than a pipe line) the principal business of which is to transport goods belonging to it on its own account and which only incidentally renders services for hire, the tax shall apply to such services or facilities only as are actually rendered by it for hire. Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system.

* * * * * * *

"Sec. 502. That each person receiving any payments referred to in Section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of Section 501 to the collector of the district in which the principal office or place of business is located.

* * * * * * *

"Any person making a refund of any payment upon which tax is collected under this section may repay therewith the amount of the tax collected on such payment; and the amount so repaid may be credited against amounts included in any subsequent monthly return. * * *"

The Revenue Act of 1921 contains provisions similar to the first clause of Section 500, quoted above (in lieu of the provisions of the 1918 Act and beginning January 1, 1922), to subdivisions (f) and (g) of Section 500 (§500, subdivisions (a) and (b)), to subdivision (a) of Section 501 (§501 (a)), and to the portions quoted above from Section 502 (§502, subdivisions (a) and (c)).

SUMMARY OF POINTS.

I.

Article 9 of Regulations 57 is an improper construction of the statutes and is invalid.

It is based upon a false conception that the statute intended to tax telegraph messages upon the usual charge to the public rather than the actual money price paid by the particular sender.

II.

The statutes impose no tax on telegrams sent under a contract for exchange of services.

The omission to tax messages sent under such contracts was deliberate.

III.

The calculation under the contract of the number of messages to be carried free by reference to established schedules of rates does not render such messages paid messages nor render them taxable.

There is no basis for a tax upon equivalents.

ARGUMENT.

POINT I.

Article 9 of Regulations 57 is an improper construction of the statutes and is invalid.

Article 9 of Regulations 57, under which the taxes discussed were exacted, interprets the pertinent provisions of the statutes in the following language:

> "Messages transmitted under contract. Where, by contract, a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section [500 (f)] of the act. The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of a common carrier and whether they are 'on line' or 'off line' are im-

> material. Thus, a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business 'free' and all such messages over its lines off the railroad lines 'free' to an amount not exceeding $10,000 per year calculated at its regular rates, and all messages over that amount at half rates, in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether 'on line' or 'off line,' and whether 'free' or at half rates, are subject to the tax provided by this section [500 (f)] of the act. The tax must be computed, collected, and paid upon each such message. * * *"

The very face of the regulation—the hypothetical case given in it—shows a misconception on the part of its framer of the purpose of the statutes.

The intent of the statutes was to base the telegram tax on the *price paid* for transmission, rather than on the value of the service received.

But the regulation provides for computing the tax upon the amount of the regular established charge for service rendered to ordinary customers, regardless of what was actually paid. There is nothing in the statute to justify such a regulation.

If a telegraph company were at liberty to deal with each customer separately, fixing different rates for different customers, as a liveryman may do, it could make special rates for favored persons. One paying less than 14 cents for a message would be subjected to no tax, even though others were charged more than 14 cents for a similar message, and paid taxes. The tax is based upon the charge *to the particular person sending the message*, not upon the charge to others, the usual charge, or the published tariff charge.

Telegraph companies may not charge one merchant at one rate and another at another, but they are specifically authorized by subdivisions 5 and 7 of Section 1 of the Interstate Commerce Act to make contracts with common carriers for interchange of services, interchange of franks, etc.

If Congress had intended to impose a tax upon free messages, reduced rate messages, messages sent in exchange for services, as well as upon messages paid for at usual rates, basing the tax upon the usual rate regardless of the amount actually paid, it would have specifically so provided. In other parts of the Revenue Acts of 1918 and 1921, Congress did make provision for taxing one thing or another on the basis of value received or value given rather than cash paid, in order to tax those receiving benefits for which they paid less than current prices, or nothing, or for which they gave value other than in money, at the same rates as if they had paid cash at usual rates.* The failure

*In the Income Tax provisions, Congress was careful to provide specifically that dividends paid in stock should be treated like dividends paid in cash (§201, (a)), that property received should be treated as the equivalent of cash to the amount of its fair market value (§202, (b)), that compensation received should be included in gross income "of whatever kind and in whatever form paid" (§213, a). In the tax on admissions and dues it was provided that persons admitted free or at reduced rates should be taxed at the same rates as those paying full price (§800, a, 2), that persons having the permanent use of boxes or seats should be taxed at the rates charged others for similar accommodations for single performances (§800, a, 5), that life members of clubs should pay the same taxes

to make any such provision with respect to the telegraph tax is clearly indicative of an intent that the purpose here was otherwise. Such exception is highly reasonable, for the only persons with whom telegraph companies may deal, otherwise than on the basis of established tariffs, are common carriers—and the purpose of Congress to permit common carriers to avail themselves of telegraph service, in connection with their regular business, without paying taxes therefor is exemplified by the exception in subdivision (g) of Section 500. Nobody but a common carrier could evade the tax by making a contract to pay otherwise than in money, and Congress deliberately intended to favor carriers. Certainly "the charge" in the statute means the charge to the taxpayer—not the charge to somebody else.

In the mind of the framer of the regulation it mattered not whether a message was paid for at regular rates, at half rate, in cash or in kind, in commodity or in privilege, or not paid for at all—the tax should be com-

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as annual members (§801). In the excise tax it was provided that manufacturers selling both at wholesale and retail should be taxed on retail sales upon the basis of wholesale prices (§ 900), that manufacturers, etc., selling, leasing or licensing taxable products at less than the fair market price should be taxed on the basis of fair market prices (§901). In the stamp tax it was provided that no-par stock should pay the same capital stock tax as $100-par stock (Art. IX, Schedule A, 3), similarly with the stock transfer tax (Schedule A, 4), and that the tax on conveyances should be imposed when either the consideration or the value of the interest in property conveyed exceeded specified amounts.

puted by reference to established rates ordinarily exacted of non-preferred customers.

He probably had in mind a thought that telegraph rates *should* be uniform—though the example he gave in the regulation showed that he knew they were not.

If, for reasons which it regarded as sufficient, a railroad had agreed to pay, and had paid twice the regular rate for telegrams, we greatly doubt that the Treasury Department would have computed the tax on the regular rate rather than on the actual charge.

The theory that the tax should be based upon the usual charge or an ideal charge, and not on the actual charge, is as absurd as would be the assessment of the same income tax against every citizen of the United States on the theory that the Constitution regards them as equal and therefore their incomes should be equal.

In the Government's brief (page 22) it is admitted that the difficulties in calculating the tax in hypothetical or actual cases do furnish some argument against the Government's position, but it is urged that the solution presented by the Regulation seems to be sound, in requiring the use of established rates for computing taxes on messages where established rates were not paid. The very statement of the proposition brands it as an example of administrative legislation—an attempt by the Treasury Department to impose taxes where Congress omitted to provide for them.

If a tax upon telegrams is to be computed by reference to the usual rates charged others, regardless of actual charges to the particular taxpayer, it must be because the statute so provides, not because the drafter of a regulation thinks that would be an easy way to compute a tax where the statute makes no provision for its computation. The taxpayer is entitled

to a strict construction of the statute. Legislation—even "interstitial legislation," as the filling in of gaps in a statute has been aptly called—is the function of Congress, not of the Treasury Department.

The regulation can not be said to be a long accepted departmental construction. The telegraph tax was first effective, under the Revenue Act of 1917, on November 1, 1917. Two months later the railroads were taken over by the Government, which held them until March, 1920. Meanwhile the Revenue Act of 1918 was passed. The Revenue Act of 1921 followed in November, 1921. But it was not until 1923 that the Treasury Department asserted the taxes in litigation, and similar taxes against other railroads. At the time of passing the Revenue Acts of 1918 and 1921 the railroads had had no occasion to attack or question the Regulations, and Congress can not be presumed to have intended to ratify them and to settle by anticipation a controversy that did not exist. The reenactment of the statutory provisions can not be interpreted as a legislative construction.

Point II.

The statutes impose no tax on telegrams sent under a contract for exchange of services.

Subdivision (f) of Section 500 of the Revenue Act of 1918 (as under the 1921 Act), imposes a tax on messages "for the transmission of which the charge is more than 14 cents." It imposes no tax upon messages for the transmission of which the charge is less than 14 cents, or for the transmission of which there is no charge, or for the transmission of which compensation is made otherwise than in money. For reasons given on pp. 9 and 10 above, this omission must be presumed to have been intentional.

The word "charge" in the statute must be taken in its commonly accepted meaning. As a verb, that word means to exact payment. As a noun, it means the amount of payment exacted. In some contexts, the word may mean a book entry, debiting a certain sum—for example in the contract between the Missouri Pacific Railroad and the Telegraph Company where it provides, "Such service * * * shall be charged for at * * * regular current telegraph rates" (R. p. 16), the context showing that payment is not to be made.

But in the statute the word is not used to indicate a mere book entry or the making of a book entry. The context makes it perfectly clear that the word means a payment exacted. If subdivision (f) stood alone there might be room for argument that the word referred to a book entry and that the law intended that a message, for which a bookkeeping entry in excess of 14 cents was made, should be taxable, even though no money payment were contemplated. But this subdivision does not indicate who shall be liable for the tax. Standing alone, it would not have the effect of rendering anybody liable for the tax. We must look to the next section to see who is liable for the tax, and Section 501 says, "the taxes * * * shall be paid *by the person paying* for the services." If nobody *pays* for the services, there is nobody from whom the tax is collectible. Similarly Section 502, in providing for the collection of the tax, says "each person *receiving any payments* * * * shall collect the amount of the tax, *if any* * * * from the person *making such payments.*" Where no such payments are made, nobody is subjected to the duty of collecting any tax and nobody is subjected to the duty of paying any tax.

A tax *in rem* may be imposed upon a tangible thing,

assessed against it, and collected by proceedings *in rem* against it without the designation of any person liable for it. But this tax, obviously, can not be collected in that manner. In the absence of a person made liable for the tax, there could be no proceedings *in rem* against a telegram. And it would be as easy to argue that it should be paid by the person receiving it, or the person transmitting it, as that it should be paid by the person filing it for transmission. As a matter of fact, none of them is made liable for a tax upon a message for which no payment in excess of 14 cents is actually made.

While Section 500 (f) bases the tax upon the charge made by the telegraph company, the provisions of Section 502 make it clear that the tax is collected by reference to the payment if the charge and the payment differ, with provision for refund of tax where there is a refund of payment. If the corporations had entered into a contract whereby the telegraph company was to charge the railroad company upon its books with messages at regular rates but to collect only half the amount of such charges,* we do not believe there is any room for argument that the tax should be computed by reference to the amount paid and not to the deliberately false book entries. A charge that is not intended to be collected is not a basis for the tax. Under such a contract, messages for which the regular charge would be twenty-five cents,

*This was true with respect to "excess" messages under the Boston and Maine Railroad's contract, the contract considered in *Delaware, Lackawanna & Western R. R.* v. *Bowers* and *W. U. Tel. Co.* v. *D. L. & W. R. R. Co.* (relied upon by the Government), and the hypothetical contract in the Regulation.

would only cost the railroad twelve and a half cents each, and would not be taxable—for there is no tax on messages for which the charge is fourteen cents or less.

Even if it had been agreed between the railroad and the telegraph company that the latter should *charge* the former for every message, and the former should *pay* the amount charged *in cash*, but the latter would refund the payment, there would be no tax, for even if a tax were exacted by the telegraph company from the railroad at the time of payment for messages, it would be refunded at the time of repayment, under Section 502.

The statute clearly intends that the tax shall only be collected upon messages *paid for*. It measures the tax, to be sure, by the amount "charged," but recognizes that this means not the amount originally entered upon an account, but the amount finally collected *and* retained by the telegraph company, a refund of any amount paid cancelling *pro tanto* the original book entry.

The "charge" for a message is clearly intended to be the amount which the person filing the message actually *pays*—not the amount which it *would* have to pay if it did not have a contract for special rates, or a contract for exchange of services, nor the amount which somebody else, having no contract, would have to pay.

As shown on p. 10, where a tax is imposed by reference to a cash basis, and Congress intends to tax other matters or transactions, not involving cash, on something else as the equivalent of cash, it says so. Its failure to say so in respect to the telegraph tax shows the absence of such intent.

The fact that the railroad company gave value for its telegrams, in transportation services rendered (computed at regular rates) and in many other ways (not

in the final analysis, the test of the matter is whether such constructive payment *does* constitute gross income to the other party. It is difficult to perceive how anything more accrues to either party than a mere benefit or advantage resulting from the contract, whereby each has agreed to perform services without charge. One or the other of the parties can *gain* from the contract, and gain alone is income (*Eisner* v. *Macomber*, 252 U. S. 189), only to the extent that the value of services rendered to it (at published rates) exceeds the value of services rendered *by* it (at published rates) for the reason that until the $75,000 limit is reached, each party is contributing to the other its bare *cost* of service, although the $75,000 limit includes a theoretical profit based upon the published rates. All that the use of published rates can accomplish, is to hasten the time when payments actually can be demanded with the inclusion therein of any profits in excess of cost.

In that situation it is not apparent that either party has derived income or gain from the transaction. They have merely agreed to postpone the time when they might *gain* from the use of each other's services. Until then, each is merely performing a contract obligation which *relieves* the other from making any payment. We submit that the contractual relief from an obligation *to pay* is not the equivalent of payment so as to constitute income or gain to the one who is so relieved from the obligation. If the contrary were true then a bankrupt would have income upon his discharge in bankruptcy to the extent of the debts from which he was relieved.

Point III.

The calculation under the contract of the number of messages to be carried free by reference to established schedules of rates does not render such messages paid *messages nor render them taxable.*

By the terms of the contract between the Missouri Pacific Railway and the Telegraph Company, the latter agreed to perform telegraphic service to be authorized by franks, and the railway company agreed to perform transportation service for the telegraph company. The contract provided that each company should charge the other at current rates and send bills at the end of each year but that no payment was to be made except with respect to any excess of such charges over $75,000. If the charges on both sides exceeded $75,000, the difference only should be paid. This was merely a method of agreeing upon the extent to which each company would render free service to the other—the quantity of free service which each undertook to perform without any compensation other than the service to be rendered by the other.

Reference to some schedule was necessary as a practical matter in drawing such a contract, unless the parties wished to insert in the contract a vast mass of tables. This necessity arose from the fact that the value of telegraphic service is never estimated on a flat word-mile basis, and the value of transportation service by railroads is never estimated on a flat pound-mile basis. If telegraphic service were ordinarily paid for on a word-mile basis, and transportation on a pound-mile basis, without variations of rate intended to cover address and signature, cost of sending and receiving, and delivery, as well as maintenance of wires, in the case of telegrams, and similar variants in the

case of freight, the companies would undoubtedly have made a contract somewhat as follows: The telegraph company agrees to render service to the extent of 750,000 word-miles, and the railroad company agrees to render service to the telegraph company to the extent of 750,000 ton-miles, each without charge to the other. Any services rendered beyond the quantity so agreed upon shall be charged and paid for at regular rates. From such a contract no implication could be drawn that the services, being rendered free, were regarded as the equivalent of cash to any specific extent. The exchange might be at regular rates, at one-half regular rates, or at twice regular rates. But neither telegraph companies nor railroads estimate the cost or value of their service at flat word-mile or pound-mile rates, so it was necessary for them in their contract to arrive at a common denominator in order to estimate the *relative* values of services given and services received.

Had the contract provided that the service performed by either party for the other should be charged at one-tenth of regular current rates and billed accordingly, but that only services so billed in excess of $7,500 should be paid for, it would have amounted to exactly the same thing as the contract that was signed, as far as the exchange of services without payment is concerned. The same would be true if the contract had called for charging and billing at ten times regular rates.

The prices to be actually paid for services in excess of the free maximum do not constitute a basis for appraisal of the services exchanged. There are many instances of contracts between railroads and telegraph companies providing that services shall be exchanged up to a specified quantity, to be measured by specified rates,

services in excess to be paid for at entirely different rates.

Two manufacturers of automobile accessories, taxable at 5% under the Revenue Acts of 1918 and 1921, might agree to exchange their products, arriving at an estimate of equivalent values by charging retail rates, where they normally would have bought and sold, in the absence of such a contract, at wholesale. Or, because of a greater margin between wholesale and retail in the case of one than in the case of the other, they might arrive at a common denominator by the process of making the book entries at four times retail for one and five times retail for the other. But it is patent that such an arrangement would not constitute, for tax purposes, a sale at such prices.*

Railroad companies and telegraph companies in their dealings with each other need not conform to established tariffs but are left at liberty to make contracts for exchange of services. Such contracts might well be drawn without any reference to money or to regular rates as far as the law is concerned. It is merely the fact that the contracts would have to be so voluminous and so intricate, if drawn without resort to money and regular rates as denominators in computation, that has caused the contracts to take their customary form. This of itself should not render them taxable on the basis of the common denominator agreed upon.

As this Court said in *Postal Telegraph-Cable Company* v. *Tonopah & Tide Water R. R. Co.*, 248 U. S. 471:

*The sale would be taxed at usual wholesale market prices, not by reason of any regulation or implication, but under the specific provisions of Sections 900 and 901 of the Revenue Act of 1918, without which provisions there could be no tax.

> "but 'exchange' is barter and carries with it no implication of reduction to money as a common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received."

And where two corporations agree to exchange services for services, the mere fact that they measure the services to be given and the services to be received on the yard-stick of usual rates, does not transform the barter into a sale for cash at those rates.

Under subdivision (f) of Section 500 of the 1918 Act (subdivision (a) in the 1921 Act) no tax is imposed upon any message for the transmission of which the charge is 14 cents or less. Unless a charge of more than 14 cents can properly and legally be attributed to a given message, there can be no tax on that message. Except by assuming that each message has been paid for at current rates, no definite charge can be attributed to any message. The messages were *not* paid for at current rates. They were exchanged for services performed by the railroad company. If it had happened that the railroad company was only called on by the telegraph company to transport one-tenth of the expected amount of freight during the year, and transportation were appraisable at current rates for the purpose of treating it as the equivalent of cash when given in exchange for telegrams, obviously the railroad company would have paid only the equivalent of $7,500 for services of the telegraph company, for which the normal charge would be $75,000. The average cost to the railroad company of each message would be only one-tenth of the usual telegraph rates, and hardly any of the messages would be taxable, messages costing less than 15 cents being exempt.

The statute intended to tax paid messages, by reference to the amount of money paid, *each message being a separate base of taxation*. The railroad company was required to pay what the Government would have us regard as the equivalent of $75,000, whether it sent any messages or not. If it only sent one message, but the telegraph company called on it for transportation up to the maximum covered by the exchange provisions, under the Government's theory that message could only have been taxed 10 cents, the statute providing a flat rate of 10 cents for any message for which the charge was more than 50 cents. This tax would accrue upon the sending of the message, not at the end of the year. The mere fact that the limitation upon the amount of "free" messages was fixed by reference to regular rates, and $75,000, does not mean that every message was compensated for at regular rates. If there had been no maximum but the railroad company had undertaken to handle all the telegraph company's transportation, and the telegraph company had undertaken to handle all the railroad company's telegrams, it is obvious that there would have been no basis for attributing any specific price to any message. And there could be no basis for computing any tax. Does the mere fixing of a maximum amount of facilities which will be exchanged so alter the nature of the arrangement as to furnish a basis for a tax?

In *Postal Telegraph Cable Co. v. Tonopah & Tide Water R. R. Co.*, 248 U. S. 471, this Court pointed out that the contract contained many mutual considerations beside the exchange of telegraphic and transportation services. The record in the case at bar does not show all the various things the respective companies agreed to do for each other without charge. But it is apparent that the telegraph company was obligated

to do more than merely transmit messages, just as the railroad was required to do more than furnish transportation. The Government entirely ignores these additional considerations and assumes that the furnishing of transportation was compensated solely by the transmission of telegrams. There is no basis for such assumption.

It may be that installing and maintaining wires, telegraph stations, etc., for the convenience of the railroad was largely compensated by transportation. There is no way of allocating any definite value given by one company to any value given by the other. Such being the case how can we allocate a definite price, in cash or in kind, to any one telegraph message? And the statute contemplates the separate taxation of each taxable message. As the Government's brief points out (p. 15) contracts of this type are common and well known to Congress and the Courts. Congress must have known that under such a contract it would be impossible to find even an equivalent to cash, to be attributed to each telegram. And knowing this, if it had intended a tax on messages sent under such a contract, it would have provided specifically for a means of computing it—as it did with respect to leased wires under Section 500 (g) of the Revenue Act of 1918 (500 (b) of the 1921 Act). It did provide for taxing leased wire contracts, and made a specific exemption to common carriers. It did not provide for taxing contracts for exchange of facilities—the omission undoubtedly being deliberate and based upon the purpose of exempting the carriers operating under such contracts as well as those using leased wires.

As the Government's brief (p. 15) indicates, Congress and the courts have recognized the difference between compensation in cash and compensation in kind.

and do not regard the latter as equivalent to the former. This being the case, messages compensated for in kind can not be taxed under a statute providing for a tax only upon messages paid for in money, under any theory of equivalents.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

JAMES S. Y. IVINS,

KINGMAN BREWSTER,

Of Counsel for

BOSTON AND MAINE RAILROAD.